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In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. . . . . .

PENNSYLVANIA THRESHERMEN & FARMERS' MUTUAL CASUALTY INSURANCE COMPANY,
a Pennsylvania corporation,
Petitioner,

v.

V. L. PHILLIPS & COMPANY, INCORPORATED,
a Virginia corporation, and
V. LANCE PHILLIPS,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Fourth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Pennsylvania Threshermen & Farmers' Mutual Casualty Insurance Company, a Pennsylvania corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, filed and entered on October 31, 1952, denying a Petition for Rehearing of the opinion by said Court in the case filed on September 5, 1952, reversing a judgment of the United States District Court for the Eastern District of Virginia, Richmond Division, therein entered on May 6, 1952.

Diversity of Opinion Below.

In reversing the District Court the Court of Appeals for the Fourth Circuit **construed a contract between the Petitioner and Respondents in such a manner as to violate the Antitrust Laws of the United States, such construction being contrary to a one sentence provision in the contract.**

Contract Now Violates Antitrust Laws.*

The contract, *as thus misconstrued,* is in unreasonable restraint of trade and is in violation of the common law of the State of Virginia and the statutes of Virginia prohibiting certain trusts, combinations and monopolies as well as the Antitrust Laws of the United States, in particular sections 1 and 2 of the Sherman Antitrust Act, 15 U. S. C. A. § 1, 2; and section 3 of the Clayton Act, 15 U. S. C. A. § 14.

Novel Question: Monopoly through good will.

The question is: **whether a contract of agency will support as ancillary to it a covenant in restraint of trade?**

This precise question is new: *can a General Agent, Respondents, by contract with an insurance company, Petitioner, legally acquire such exclusive rights in all renewal insurance, after the contract is canceled justifiably, and thereby exclude the Resident Agents and the insurance company, Petitioner, from all renewal insurance in perpetuity and insureds from freedom of selection of those with whom they wish to deal?*

The answer is of importance far beyond the particular facts and parties involved. It affects every contract where continuing good will is used as a monopoly excuse.

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* Sections 1 and 2 of the Sherman Act, Sec. 3 of the Clayton Act and the Virginia statute on "Trusts, Combinations and Monopolies," Title 59, Chapter 3, Code of Virginia 1950, are reproduced in the Appendix to the Brief.

SUMMARY OF MATTER INVOLVED.

The issue here is whether you can secure, after contract cancellation, a monopoly and permanent property rights under that monopoly under a system of contracts between an insurance company, the Petitioner, and the Respondents as "Agent" and the "Resident Agents," each of whom had a written contract signed by the Petitioner and the Respondents. (R. 5-11.) By this system of contracts, as construed by the Court of Appeals for the Fourth Circuit, in reversing the District Court, and as construed by the Respondents, *a complete monopoly of indefinite duration* is granted over the Petitioner's business in the State of Virginia to the Respondents, irrespective of the interests of the Petitioner, insurance company, of the Resident Agents and of the insureds. To permit such monopoly will be an unreasonable restraint of trade in violation of sections 1 and 2 of the Sherman Antitrust Act and section 3 of the Clayton Act.

There is conflict of opinion below on the issue of the construction of this contract. (R. 5-7.)

No other opportunity to present Antitrust Issue.

There is no other opportunity, except in this Court, to present this violation of the Antitrust Laws of the United States and settle this novel excuse for Antitrust violation.

NATURE OF THE SUBJECT MATTER.

The Petitioner, insurance company, entered into a contract with the Respondents as "Agents." (R. 5-7.) The Petitioner and Respondents jointly entered into a contract with some one hundred seventy-three "Resident Agents" throughout the State of Virginia to procure insurance for the Petitioner, insurance company. This Resident Agent contract signed jointly by Petitioner and

Respondents authorized each Resident Agent to deliver policies and collect premiums; fix the compensation on a commission basis and provided that the Resident Agent would forward all evidence of insurance effected by him to the Respondents as "Agent" for the insurance company and the Resident Agents agreed to remit to the "Agent" within forty-five days all premiums collected.

Petitioner had the relationship of a manufacturer to Respondents as the "Agent" wholesaler and the "Resident Agents" had the duties of a retailer.

The Respondents sued the Petitioner for damages alleging that the Petitioner interfered with, and deprived Respondents of, the expirations on the renewal insurance business created by the Respondents. The Petitioner denied such interference as to any business written by Respondents individually and asserted that Respondents had no right to "expirations"* on policies written by Petitioner's Resident Agents. The District Court adopted the view of the Petitioner and entered a summary judgment dismissing the action except it allowed judgment for commissions on certain policies written by one Resident Agent before the termination of the contract. From this judgment the Respondents appealed to the Fourth Circuit Court of Appeals.

The executive vice-president of Petitioner who negotiated the contract with Respondents, in his affidavit in support of the motion for summary judgment, stated that Respondents requested, during negotiations for this contract, the withdrawal of the Petitioner from the State of Virginia in the event of the termination of the proposed

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* An insurance trade term meaning the right to data on expirations of insurance policies so the right time can be selected to solicit renewal insurance business.

contract but **Petitioner refused to do this and, in consequence of this, inserted the last sentence in paragraph 16.**

> "This Agreement may be terminated at any time at the pleasure of either party by giving a ninety (90) days notice to the other in writing, but any liability for monies received by the Agent shall not be discharged until all amounts are satisfactorily settled and paid by the Agent. In the event of the termination of this Agreement, the Agent not being in default and thereafter promptly accounting for and paying over balances not in default for which he may be liable, the Agent's record, use and control of the expirations shall be deemed the property of the Agent and left in his undisputed possession; otherwise the records, use and control of expirations shall be vested in the Company. **Furthermore, upon termination of this Agreement, from any cause whatsoever, neither the Agent or his heirs, administrators, executors or assigns shall have any right to any commission upon, or remuneration from, the renewal of any policy or business previously written, which may be continued with the Company.**" (R. 7; 199 F. (2d) 244, 247, C. A. 4.)

The Petitioner has taken the position that the contract it had with the Agent, Respondents, left the Respondents in control of the **original** contracts of insurance so long as the contract between Petitioner and Respondents was in existence, but upon cancellation of Respondents' contracts the future insurance business and the **renewal business** was open for free competition.

The Petitioner's position is, contrary to that of the Court of Appeals for the Fourth Circuit, that **the last sentence of paragraph 16 of the contract between Petitioner and Respondents must be given effect.** That effect should be that upon the termination of the agreement between the Petitioner and Respondents from any cause whatsoever, **neither the Agent nor his heirs (Respondents), etc., "shall**

have any right to any commission upon, or remuneration from, the renewal of any policy or business previously written, which may be continued with the Company."

Respondents take the position that such last sentence in paragraph 16 does not modify their position and that **they have a continuing monopoly on the insurance business written by them and also by all of the Resident Agents which prevents liberty of selection of agents by the insureds, prohibits solicitation of business of insured by the Resident Agents, prohibits the doing of business with the Petitioner, insurance company, by the Resident Agents, after the contract has been cancelled, and forever puts the Petitioner and the Resident Agents out of business in any future dealings with the insureds who may wish to be reinsured.**

This has all the effect of a boycott.

With that position the District Court agreed in the construction of the contract with Petitioner; and with that position the Court of Appeals for the Fourth Circuit disagreed. **In disagreeing it has construed the contract so that it becomes an unreasonable restraint of trade** by not giving effect to the last sentence in paragraph 16 of the contract. (R. 7.)

It is a destructive business practice.

DECISION OF THE DISTRICT COURT.

The unreported opinion of the United States District Court for the Eastern District of Virginia is printed at R. 40-46; the order on pretrial conference and final judgment is printed at R. 47-8; the opinion in the United States Court of Appeals for the Fourth Circuit is reported at 199 F. (2d) 244 and in the record at pages 82-88.

The Respondents instituted this action in the District Court, alleging that your Petitioner had intentionally, voluntarily, and deliberately interfered with a property right claimed by them under the name of "expirations" (R. 1-3.) After filing its answer your Petitioner filed its motion for summary judgment (R. 53-60.) The facts necessary to a decision on the motion for summary judgment were developed by affidavits in support thereof, requests for admissions, an affidavit of the individual Respondent, and statements of fact by counsel made at the hearing on the motion.

The District Court, in its memorandum and subsequent order on pretrial conference, held, in substance, that the only issue in the case being whether or not your Petitioner had committed an actionable wrong in reappointing some ninety persons as its Resident Agents in the territory, formerly the territory of the Respondents, under their general agency contracts with your Petitioner, and *the Respondents properly conceding that such ninety Resident Agents rather than themselves were the owners of their respective "expirations,"* it entered final judgment in favor of the present Petitioner except for a small amount admittedly due for commissions earned *prior* to the termination of the general agency contracts between the parties hereto.

CONFLICT OF DECISION: THE COURT OF APPEALS DISAGREES WITH DISTRICT COURT.

In its opinion of February 5, 1952, the Court of Appeals, while professing its chief reliance upon the wording of paragraph 16 of the contracts between the parties hereto, invoked the so-called doctrine of unjust enrichment (R. 87) and held that during the period that the Respondents had been your Petitioner's General Agents, **they had become the owners of the good will of all of your Petitioner's business in the territory including the business of the Resident Agents and their rights to deal with the Resident Agents by the right of the Resident Agents to deal with the insured on renewal contracts;** and **that your Petitioner having, after the Respondents were no longer its General Agents** in Virginia, reappointed the ninety agents mentioned, it was liable in damages.

The Resident Agents and the insureds' interests were disposed of without a hearing.

REASONS FOR THE ALLOWANCE OF THE WRIT.

Petitioner believes that the writ of certiorari should be granted in this case for the following reasons, and accordingly, the discretionary power of this Court is invoked:

I. The business of insurance is interstate commerce. It is subject to the jurisdiction of the Antitrust Laws of the United States.

One who uses insurance agency contracts to set up **exclusive wholesale and retail dealerships excluding freedom of competition on insurance contracts violates the Antitrust Laws.** It impedes the right of the insurance company, Petitioner, its General Agents and Resident Agents and the rights of the insured to deal with one an-

other as they please in free and open competition without restraint. This is essential because of the public interest in insurance. *United States v. South-Eastern Underwriters Association, et al.*, 322 U. S. 533, 562; The McCarran Act, 59 Stat. 33, 15 U. S. C. §§ 1011, 1012, 1013(b).

With reference to the McCarran Act, the President of the United States said in his message to Congress:

> "* * * It is clear from the legislative history and the language of this Act, that the Congress intended no grant of immunity for monopoly or for boycott, coercion or intimidation * * *." (Approval Message, 91 Cong., Rec. 1992, March 9, 1945.)

No monopoly in writing insurance:
Exclusive dealerships are illegal.

As a matter of custom, the Resident Agent controls his "expirations"—i.e., his information on expirations to permit him to solicit renewal of the insurance by the insured. He should have a right to deal with anyone. This contract, as construed, prevents this.

There must be no forcing of the public
to deal only on seller's terms:
Public interest is paramount.

Nothing affects the public interest as does the insurance business. The insurance business is not unlike the merchandising of any other commodity, whether it be oil, automobiles or other manufactured products. Wholesale contracts and exclusive dealerships which have the effect of unreasonable restraint of trade are in violation of the Antitrust Laws of the United States, because they force the customer to deal only on the seller's terms and only with those whom the seller determines. *Standard Oil of California v. United States*, 337 U. S. 293; *Lorain Journal v. United States*, 342 U. S. 143, 149-152, 154-55.

II. Conflict with this Court's decisions. Exclusive dealerships are illegal.

The right to solicit customers for further renewals of insurance insureds have once bought, must be subject to the Antitrust Laws of the United States; and to the laws on monopoly of the states, if there may be intrastate transactions.

The contract, as construed by the Court of Appeals **without giving weight to the last sentence of paragraph 16,** is an unreasonable restraint of trade because it conveys, as intended, complete ownership, not only in the income from the original contracts of insurance resulting from the work of the General Agent (wholesaler) and his Resident Agents (dealers) who were working under his direction, **but it extends the monopoly over that business to renewals of insurance so that neither the Petitioner, insurance company, after the cancellation of the contract, is permitted to deal on renewal insurance with the Resident Agents or the insured.**

Such a contract is contrary to public policy.

While there may be no objection to an Agent collecting his premiums as his pay for the work he did in securing the initial insurance policy, he does not acquire any right in renewal insurance, when that contract is canceled, that automatically forces the insured and the Resident Agent (dealer) to deal with him only because he claims "good will" under a legally canceled contract.

III. Respondents' intent to violate the Antitrust Laws of the United States: A covenant not to sell a competitor's goods is illegal.

A contract must be construed to not only give full effect to all of its parts, but must be so construed as to make it legal. The Court of Appeals confirmed Respondents' illegal intent saying:

> "In our view it is unnecessary to dwell on the custom since we base our decision on the contract between the parties.
>
> **"The executive Vice-president of the Company who negotiated the contract with plaintiff, in his affidavit in support of the motion for summary judgment, states that plaintiff requested the withdrawal of the defendant from the State of Virginia in the event of the termination of the proposed contract but defendant refused to do this and, in consequence of this, inserted the last sentence in paragraph 16."** (R. 84; 199 F. (2d) 244, 247.)

Therefore, the effort of Respondents to keep the Petitioner, insurance company, out of the State of Virginia in the event of termination of the proposed contract at the time it was being negotiated, which effort was rejected by the Petitioner, **shows the intent of the Respondents to monopolize Petitioner's insurance business in the State of Virginia.**

A covenant not to sell in a territory is unreasonable restraint of trade, deprives the public of the seller's goods and impedes commerce. *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, 354; *Standard Oil Co. of Calif. v. United States*, 337 U. S. 293; *Lorain Journal v. United States*, 342 U. S. 143, 149-152, 154-5; *Fashion Originators' Guild v. Federal Trade Commission*, 312 U. S. 457; *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U. S. 219, 227-235, 242.

To correct any such implication in this contract, there was inserted in paragraph 16 of the signed contract between Petitioner and Respondents the last sentence of the paragraph which dealt with **the rights of the Petitioner upon cancellation of the contract for any cause whatsoever to do business freely in the State of Virginia on renewal contracts or on new insurance.** That sentence reads:

> "* * * **Furthermore, upon termination of this Agreement, from any cause whatsoever, neither the Agent or his heirs, administrators, executors or assigns shall have any right to any commission upon, or remuneration from, the renewal of any policy or business previously written, which may be continued with the company."** (R. 7.)

The Court of Appeals said:

> "The expirations referred to in the preceding paragraph were intended to be, and beyond a doubt, were expirations on all business produced by the plaintiff or its subagents throughout the State of Virginia, excluding the two counties stated in the Contract. The Contract admits no other reasonable interpretation * * *." (R. 85; 199 F. (2d) 244, 247.)

The Court of Appeals, having given this monopoly on all future business to Respondents, they are **thus enabled to unreasonably restrain trade exactly in accord with the INTENT they had to create such a monopoly.**

IV. Exclusive dealerships are illegal under the Antitrust Laws of the United States.

A general agency contract (that is, a wholesaler contract) cannot legally require that upon its termination the Resident Agents (dealers) cannot deal with the insurance company, Petitioner (as a manufacturer), and the Petitioner, insurance company, must refrain from dealing with the Resident Agents in perpetuity.

The Court of Appeals' construction of this contract means that the insurance company, Petitioner, upon the legal cancellation of the Respondents' contract as Agent (as a wholesaler) still continues in effect to prevent the Petitioner, insurance company, from reappointing as its Resident Agents and accept renewal business from insureds whose original other policies they solicited and secured. **The practical effect on all contracts of all types will be to permit monopoly.**

In merchandising, patent contracts, radio and television contracts with sports, newspaper and radio station combined advertising, etc., that restrictive contracts alleged to be necessary to protect property must yield if they violate the Antitrust Laws of the United States.

V. A General Agent has no proprietary interest in his principal's business: under Virginia law an Agent, merely by execution of his representative powers acquires no proprietary interest.

The real question in this case is whether a contract of agency, pure and simple, will support as ancillary to it a covenant in restraint of trade? Respondents seek to justify an affirmative answer to this question and were successful in the Court of Appeals on the ground that the Agent, under the canceled contract, had acquired a property right in good will which justified its restrictive actions in restraint in trade.

Under Virginia law, an agent, merely by the execution of his representative powers, acquires no property interest in the business of his principal. *Clay v. Butler,* 132 Va. 464, 471-2, 112 S. E. 697 (Supreme Court of Appeals of Virginia); *Casey v. Walker & Mosby,* 122 Va. 465, 95 S. E. 434; *Bernard v. Gardner Inv. Corp.,* 129 Va. 346, 106 S. E. 346.

Such has also been the law as set down in this Court. See opinions of Mr. Chief Justice Marshall in *Hunt v. Rousmanier's Administrator,* 8 Wheat. 174; Mr. Chief Justice Waite in *Missouri ex rel. Walker v. Walker,* 125 U. S. 339; Mr. Chief Justice Harlan in *Willcox & Gibbs v. Ewing,* 141 U. S. 627; and Mr. Chief Justice Stone in *Steele v. L. & N. R. Co.,* 323 U. S. 192, 202.

The Court of Appeals below has held to the contrary that the General Agents (Respondents), solely by virtue of their acting as General Agents for Petitioner in Virginia, became the owners of the good will of all of the Petitioner's business conducted by them for it and that ownership would extend in perpetuity, **after the contract was canceled,** not only to the detriment of the Petitioner, insurance company, and to the Resident Agents, who wished to continue to deal with the Petitioner, but to the detriment of the insureds as well.

Under the laws of Virginia, good will cannot exist except as ancillary to a business, it not being susceptible of separate ownership. *Clay v. Butler,* 132 Va. 464, 471-2, 112 S. E. 697 (Supreme Court of Appeals of Virginia); *Casey v. Walker & Mosby,* 122 Va. 465, 95 S. E. 434; *Bernard v. Gardner Inv. Corp.,* 129 Va. 346, 106 S. E. 346.

Mr. Chief Justice Marshall initiated the rule for this Court in *Hunt v. Rousmanier's Administrator,* 8 Wheat. 174, that a general insurance agent has no proprietary interest. That has been the rule of the circuits as in *Pellet v. Manufacturers' Insurance Company,* 104 Fed. 502 (C. A. 7); *Pierce v. Connecticut General Life Insurance Company,* 106 F. (2d) 989 (C. A. 3); and *Fidelity Insurance Agencies v. Citizens Casualty Co. of New York,* 194 F. (2d) 43 (C. A. 7).

PRAYER.

WHEREFORE, your Petitioner respectfully prays that writ of certiorari be issued to the Court of Appeals for the Fourth Circuit to the end that this cause may be revived and determined by this Court in accordance with the principles of law heretofore announced by it; and that the decree of the Court of Appeals for the Fourth Circuit be reversed; and that the Petitioner be granted such other and further relief as may be deemed proper.

PENNSYLVANIA THRESHERMEN AND FARMERS' MUTUAL CASUALTY INSURANCE COMPANY,

BY ROBERT LEWIS YOUNG,

Counsel for Petitioner.

WALTER E. HOFFMAN,
JOHN G. MAY, JR.
ROBERT LEWIS YOUNG,
H. A. TOULMIN, JR.,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. .....

PENNSYLVANIA THRESHERMEN & FARMERS' MUTUAL CASUALTY INSURANCE COMPANY,
a Pennsylvania corporation,
Petitioner,

v.

V. L. PHILLIPS & COMPANY, INCORPORATED,
a Virginia corporation, and
V. LANCE PHILLIPS,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS OF THE COURTS BELOW.

The District Court's memorandum is found at R. 40-46. The order on pretrial conference and final judgment appears at R. 47-8. The Court of Appeals decision is found at 199 F. (2d) 244 and at R. 82-88.

JURISDICTION.

Petitioner invokes the jurisdiction of this Court under sections 1 and 2 of the Sherman Antitrust Act, 15 U. S. C. A. §§ 1, 2, and section 3 of the Clayton Act, 15 U. S. C. A. § 14; 28 U. S. C. A. § 1254.

The case believed to sustain jurisdiction is *United States v. South-Eastern Underwriters Association, et al.*, 322 U. S. 533.

STATEMENT OF THE CASE IN THE PETITION.

The foregoing Petition contains a summary of the material facts necessary to an understanding of the reasons relied upon for reliance of the writ as well as a statement of the question relied upon in the case.

THE SPECIFICATION OF ERRORS.

The specification of errors herein relied upon are those reasons incorporated generally in the reasons set forth in the Petition as grounds for its allowance.

ARGUMENT.

I. The business of insurance is interstate commerce. It is subject to the jurisdiction of the Antitrust Laws of the United States.

This Court has jurisdiction of insurance, particularly where the violation of the Antitrust Laws of the United States is at stake. *United States v. South-Eastern Underwriters Association, et al.*, 322 U. S. 533. No state can authorize restraints of illegal character: "it cannot be that any companies have acquired a vested right to engage in such destructive business practices." (Ib., p. 562.)

The position of Respondents is that this canceled contract confers on them a good will right in the business of their principal, your Petitioner, which justifies a complete monopoly of all renewal insurance business and monopoly of the expiration data of the Resident Agents which concededly belongs to them. They seek complete monopoly, under the canceled contract, thus prohibiting enjoyment of renewals by Petitioner and Resident Agents, the latter being in possession of the "expiration" data created by them. Respondents seek this right on the ground that they acquired a good will property right in

your Petitioner's business by virtue of their having executed their duties as your Petitioner's Agents.

There are several brief answers to this proposition:

(1) Such a restriction is monopoly and an unreasonable restraint of trade. Exclusive dealerships, whether under contract or without it, whether under the guise of property rights or good will, have been declared by this Court to be illegal. *Standard Oil of California, et al. v. United States,* 337 U. S. 293.

(2) An attempt to force all business through some designated, contractual, single channel of commerce irrespective of the purchaser's wishes, is illegal. *Lorain Journal Co. et al. v. United States,* 342 U. S. 143, 149-152, 154-5.

(3) The Respondents did not acquire the Petitioner's good will and right to do business in the State of Virginia and to deal with whomsoever it pleases under some fancied theory Respondents acquired a property right in the nature of good will. Respondents' claim of property rights of such exclusive character in renewal insurance violates the Antitrust Laws of the United States and the statute on monopoly of the State of Virginia.

The cases on the foregoing are set forth under points V in the Petition and V in this brief.

II. Conflict with this Court's decisions. Exclusive dealerships are illegal.

Under the instant contract as construed by the Court of Appeals, the dealerships of the Resident Agents were exclusively the property of Respondents and these more than one hundred seventy-three Resident Agents could not deal with anyone except with Respondents.

Exclusive dealerships are illegal. *Standard Oil of California, et al. v. United States,* 337 U. S. 293, 294-314, 315.

The conduct of the Respondents under this contract as interpreted, is to monopolize the outlets to the consumer, the insureds and potential insureds, in perpetuity for all renewals to thus force the Resident Agents, or others selected by Respondents, to serve Respondents against their free choice. This prevents free dealings in renewal insurance, even though the Resident Agents own the "expirations" and, therefore, the right to data on which renewal solicitations are based.

The conduct of the Respondents is being used to destroy the business of the Petitioner in its right to deal freely with the insureds and Resident Agents on renewal insurance. *Lorain Journal v. United States,* 342 U. S. 143, 149-152, 154-55; *Standard Oil of California et al. v. United States,* 337 U. S. 293.

This effort to force a monopoly of renewal insurance contracts violates §§ 1 and 2 of the Sherman Antitrust Act.

"A combined refusal to deal with anyone as a means of preventing him from dealing with a third person, against whom the combined action is directed, is a boycott; and a boycott is prima facie unlawful; it must be justified." *Fashion Originators Guild v. Federal Trade Commission,* 114 F. (2d) 80, 84 (C. A. 2, L. Hand), affirmed 312 U. S. 457.

III. Respondents' intent to violate the Antitrust Laws of the United States: a covenant not to sell a competitor's goods is illegal.

A covenant in a contract by a retailer not to sell the goods of a competitor is illegal. *Standard Co. v. Magrane-Houston Company,* 258 U. S. 346, 356. A dealer-manufacturer contract by which the dealer agreed to exclusive sales of the manufacturer's products and agreed not to sell a competitor's, violates § 3 of the Clayton Act. *Standard Oil of California, et al. v. United States,* 337 U. S. 293, 294-314. Where such contracts impede a substantial amount of competitive activity there is violation of the law. (Ib. p. 314.)

The instant contract, as construed, is a monopoly of all the business of renewals of insurance written, excluding any Resident Agent at the will of the Agent and forcing the persons insured to trade on new contracts with such insurance company as the Respondents designate. The power to boycott the Petitioner, insurance company, and Resident Agents was complete when the last sentence of paragraph 16 was discarded by the Court of Appeals for the Fourth Circuit. *Fashion Originators' Guild of America, Inc., et al. v. Federal Trade Commission,* 312 U. S. 457, 463, 466.

This contract, as thus construed, destroys the competition between General Agent and Resident Agents and the insured for free competition for renewal business. *Mandeville Island Farms, Inc., et al. v. American Crystal Sugar Co.,* 334 U. S. 219, 227-235, 242. "Commerce is intercourse" said Chief Justice Marshall in *Gibbons v. Ogden,* 9 Wheat. 1, **and intercourse must be free if there is to be reasonable competition.**

This contract, as construed, prevents it.

IV. Exclusive dealerships are illegal under the Antitrust Laws of the United States.

Exclusive dealerships are illegal under the Antitrust Laws of the United States. This Court has had occasion to examine recently various facets of illegal control of free merchandising and competition by the device of exclusive dealerships. The cases are cited in the Petition under this point IV and need no repetition here.

By analogy not only has this been decided in merchandising cases, but in patent cases where an attempt to utilize the property right of the patent as a justification for controlling unpatented materials; in cases involving sports where there was a collateral monopoly tried in communications, in television, radio, etc.; in newspaper publishing where the business and good will of a publisher was sought to be used as the basis for forcing advertisers to use both the publisher's newspaper and radio or television stations; and in labor cases where manufacturers and unions have followed a course of conduct under the guise of inherent right of labor to be exempt from control and have stepped outside the boundaries of that exemption with the manufacturer and conspired illegally under the Antitrust Laws.

A common principle is found in all these cases. *Legal rights and property ownership can never justify the violation of the Antitrust Laws.*

V. A general agent has no proprietory interest in his principal's business: Under Virginia law an agent, merely by execution of his representative powers acquires no proprietary interest.

Under the Virginia law, good will cannot exist except as ancillary to a business. Upon Respondents' appointment as General Agents being terminated by the Petitioner, the Respondents could not become the owners of the good will of Petitioner's business in Virginia. A covenant in restraint of trade is not ancillary. Such a covenant was not necessary to the right of any property of the Respondents.

The Court of Appeals' error was in holding that your Petitioner had covenanted validly with the Respondents not to trade with certain persons, even though Respondents were not possessed of any right of property to which the covenant might be ancillary or for the protection of which it might be necessary.

As Judge Story said in *"Story on Agency,"* 9th ed., pages 235-6, Sec. 207:

> "* * * no agent will be permitted to take beyond a reasonable compensation for his services, or to hold any profits incidentally obtained in the execution of his duty, even if it be sanctioned by usage. Such a usage has been severely stigmatized, as a usage of fraud and plunder."

The last phrase was based upon the decision of Lord Ellenborough in *Diplock v. Blackburn,* 3 Camp. 43, 44, that any other rule "would give the agent an interest against his principal."

That is the rule of Virginia as stated by the Supreme Court of Appeals of that state in *Clay v. Butler,* 132 Va. 464, 471-2, 112 S. E. 697.

This Court through Mr. Chief Justice Marshall in *Hunt v. Rousmanier's Adm'r.*, 8 Wheat. 174, held an Agent acquired no property interest in the subject of the agency when his interest is merely in the benefits to be derived from his execution of his power as Agent. *Casey v. Walker & Mosby,* 122 Va. 465, 95 S. E. 434; *Bernard v. Gardner Inv. Corp.*, 129 Va. 346, 106 S. E. 346; *Missouri v. Walker,* 125 U. S. 339; and *Willcox & Gibbs v. Ewing,* 141 U. S. 627.

Excuse of Respondents.

The sole excuse of the Respondents for this unlawful restraint of trade now granted them by the Court of Appeals is that they have a proprietary interest in the principal's (Petitioner) business and to protect that good will so acquired as property they must have a rigid restriction on all concerned in the business of renewal insurance. They wish to upset the settled law of Virginia and of the United States, as well as in Great Britain, as to the rights of an Agent.

Against upsetting this settled rule by the Court of Appeals below, we suggest consideration of the statement of Lord Chief Justice Hale in his "*Considerations Touching the Amendment and Alteration of Laws,*" published in *Hargraves Law Tracts,* Vol. I, page 253, where he said:

> "* * * so that it is a great adventure to go about to alter it, without very great necessity, and under the greatest demonstration of safety and convenience imaginable."

We respectfully suggest that obedience to the rulings of this Court, under the Antitrust Laws as well as other applicable laws, which jealously guard the freedom of the individual to select the persons with whom he wishes to deal, and the right of a person in business to accept as his

customers those who wish to deal with him, should settle this case. We respectfully suggest that the Respondents have no right to an exception to these decisions of this Court because of a good will claimed under a canceled contract.

Respectfully submitted,

PENNSYLVANIA THRESHERMEN AND FARMERS' MUTUAL CASUALTY INSURANCE COMPANY,

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APPENDIX.

SHERMAN ANTITRUST ACT (1890)—As Amended by Miller-Tydings Act (1937).

§ 1. Trusts, etc., in Restraint of Trade Illegal; Resale Price Maintenance Contracts Excepted When Not Contrary to State Law; Penalty.—Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: (Provided, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale and the making of such contracts or agreements shall not be an unfair method of competition under section 45, as amended and supplemented, of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.) Every person who shall make any contract or engage in any combination or conspiracy

declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, Chap. 647, Sec. 1, 26 Stat. 209; August 17, 1937, Chap. 690, Title VIII, 50 Stat. 693; U. S. C. 15:1.)

The matter enclosed in parenthesis comprises the Miller-Tydings Act.

§ 2. Persons Monopolizing Guilty of Misdemeanor.—Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (26 Stat. 209; U. S. C. 15:2.)

CLAYTON ACT (1914)—As Amended by Robinson-Patman Act (1936).

§ 3. Sale, Etc., on Agreement Not to Use Goods of Competitor.—It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale or goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use

or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. (38 Stat. 731, § 3; U. S. C. 15: 14.)

CODE OF VIRGINIA, 1950, Entitled "Trusts, Combinations and MONOPOLIES," Title 59, Chapter 3.

Sec. 59-20. Definitions.—The word *"person"* or *"persons,"* as used in this chapter, includes corporation, partnerships and associations existing under or authorized by any state or territory of the United States or a foreign country.

A *"trust"* or *"monopoly"* is a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations or associations of persons, for any or all of the following purposes:

(1) To create or carry out restrictions in trade or business;

(2) To limit or reduce the production or increase of merchandise or commodities;

(3) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or commodities;

(4) To fix at a standard or figure, whereby its price to the public or consumer is in any manner controlled or established, any article, thing or commodity of merchandise, produce, business or commerce intended for sale, barter, use, enjoyment or consumption in this State;

(5) To make, enter into, execute or carry out contracts, obligations or agreements of any kind or descrip-

tion by which they: (a) Bind or have bound themselves not to sell, dispose of or transport any article or commodity, or an article of trade, use, merchandise, commerce or consumption below a common standard figure or fixed value; (b) agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure; (c) in any manner establish or settle the price of an article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, purchasers or consumers in the sale or transportation of such article or commodity; or (d) agree to pool, combine or directly or indirectly unite any interests which they have connected with the sale or transportation of such article or commodity that its price might in any manner be affected.

* * * * *

Sec. 59-39. Construction of chapter.—The provisions of this chapter shall be liberally construed in order effectually to secure the enforcement of the provisions hereof for the protection of the people of the Commonwealth.

Sec. 59-40. To what trusts, combinations and monopolies chapter applicable.—This chapter shall apply only to those trusts, combinations and monopolies which are unreasonable or inimical to the public welfare, as hereinbefore defined, and are prohibited and penalized under the provisions of any law of the United States if their activities extended to interstate as well as intrastate commerce.